Office Supreme Court, U.S.
FILED
MAR 28 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961

No. 740

EDWARD WRIGHT, MAXINE WRIGHT, PEYTON SMITH, MILDRED SMITH, LEXTON SMITH and RICHARD HELLER,
Petitioners,

v.

DONALD C. WAGNER, DAVID M. SMALLWOOD and CITY OF PHILADELPHIA

BRIEF OF APPELLEES CONTRA PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

MATTHEW W. BULLOCK, JR.
Assistant City Solicitor
JAMES L. STERN
Deputy City Solicitor
DAVID BERGER
City Solicitor
Attorneys for Appellees

703 City Hall Annex
Philadelphia 7, Pa.

THE LEGAL INTELLIGENCER, 10 S. 37TH ST., PHILA. 4

TABLE OF CONTENTS

	Page
Statement	1
Argument	3
I. The Present Case Is Moot	3
II. The Appellants Have Not Fairly Stated the Facts of the Case	4
III. Even If Arguendo the Question Presented to This Court by the Appellants Is Taken as a Fair Statement of the Case, It Offers No Basis for the Granting of a Writ of Certiorari by This Court	7
(a) Appellants Never Raised Any Federal Question in the State Courts	7
(b) Appellants Have No Rights Protected by the United States Constitution or Any Federal Law	7
Conclusion	9

TABLE OF CITATIONS

Cases:

Alejandrino v. Quezon, 271 U.S. 328 (1925)	3, 4
Baldwin v. Kansas, 129 U.S. 52 (1888)	7
Brooks v. Missouri, 124 U.S. 394 (1888)	7
Coppage v. Kansas, 236 U.S. 1 (1915)	4
Doremus v. Board of Education, 342 U.S. 429 (1952)	3, 4
Erie Railroad Co. v. Purdy, 185 U.S. 148 (1902)	7
Hanson v. Denckla, 357 U.S. 235 (1958)	7

TABLE OF CITATIONS—*Continued*

Cases:

	Page
Henderson Bridge Co. v. Henderson, 141 U.S. 679 (1891)	8
Hooker v. Burr, 194 U.S. 415 (1904)	4
Morley v. Lake Shore and M. S. R. Co., 146 U.S. 162 (1892)	8
Morrison v. Watson, 154 U.S. 111 (1894)	7
Singer Mfg. Co. v. Wright, 141 U.S. 696 (1891)	4

STATEMENT

The appellants brought suit in equity against the City of Philadelphia praying that the City be enjoined from complying with the terms of a contract between the City and the owner of a certain dump located outside the City (hereinafter referred to as Landfill) under the terms of which the City agreed to make certain payments for the right to dump refuse. The contract was dated December 30, 1960, and authorized the City during the following calendar year to dump 500,000 cubic yards of refuse. The terminating date of the contract as originally executed was therefore December 31, 1961. The City arranged for use of the dump beyond this time until March 15, 1962, on which date the contract was finally terminated.

The appellants, employees of a rival dump (hereinafter referred to as Clearview) and their wives sued claiming that Clearview should have received the contract awarded to Landfill. Appellants charged that the contract with Landfill was unlawful because (1) the contract had not been awarded as a result of competitive bidding as allegedly required under the Philadelphia Home Rule Charter, (2) the contract had allegedly not been approved by City Council as suppposedly required by the City Charter and (3) the Streets Commissioner of Philadelphia had allegedly shown bias against Clearview in awarding the contract to Landfill. The Complaint in Equity filed by the appellants did not claim violation of any right protected by the United States Constitution or any federal law.

The Chancellor after a very lengthy hearing, sustained the position of the appellants. There was considerable testimony regarding the history of the negotiations by the Streets Commissioner leading to the contract in question. There was further testimony to the effect that Clearview was adjacent to the City, had been guilty of numerous violations of State health laws and that this dump had been a considerable source of annoyance to Philadelphia residents

nearby because of dirt, rats and flooding. The Chancellor's conduct of the trial clearly demonstrated a bias in favor of the appellants and against the City. On many occasions, he took over the conduct of the trial for the appellants' attorney; an examination of the record indicated that the Chancellor asked over 2,000 questions, considerably more than were asked by appellants' counsel. The appellants not only had their day in court but were permitted, over the City's objection, almost unlimited latitude in their efforts by irrelevant and incompetent testimony to discredit the City administration in general and the Streets Commissioner in particular.

The Supreme Court of Pennsylvania reversed the court below on three grounds that (1) competitive bidding for dump sites was not required by the Philadelphia Home Rule Charter, (2) the contract involved had in fact been approved by City Council and (3) the Streets Commissioner had not abused his discretion in awarding the said contract, but that the Chancellor had shown bias against the City and in favor of the appellants. The appellants petitioned for reargument, which petition was denied. The said petition did not raise any federal question.

ARGUMENT

The City of Philadelphia submits that (1) the present case is moot, (2) the appellants have not fairly stated the facts of the case to this Court and (3) assuming *arguendo* that the facts have been fairly stated, they offer no basis of jurisdiction in this Honorable Court.

I. The Present Case is Moot.

The contract involved in the present litigation was for a term of one year from January 1, 1961, to December 31, 1961. Upon the issuance of the order of July 31, 1961, by the Court of Common Pleas enjoining the City from complying with the terms of the contract, the City appealed to the Supreme Court. Under the laws of Pennsylvania, this appeal by the City constituted a supersedeas. The City, therefore, continued to dispose of refuse under the contract. On December 5, 1961, the Supreme Court of Pennsylvania reversed the court below and held that the contract was lawful and that the City officials had not abused their discretion in any way. Thus the contract would normally have expired on December 31, 1961. It was, however, extended until March 15, 1962, at which time it was terminated.

The case is therefore moot. The contract which is the subject of the litigation is no longer in effect. Since no question of damages of any kind was ever raised and the only relief sought was injunctive, no action by this Honorable Court could have any effect as far as this controversy is concerned. It is well settled that this Court will not decide moot questions. Thus in *Doremus v. Board of Education*, 342 U.S. 429 (1952) where a parent challenged a law requiring Bible reading in a public school attended by his child, this Court refused to consider the matter on the ground that the case was moot, when it appeared that the appeal had been filed after the child graduated from the school. Similarly, this Court in *Alejandrino v. Quezon*, 271 U.S. 528 (1925) refused to consider a petition for injunction and mandamus to restore a suspended Philippine

senator to office after the term of suspension had expired on the ground that the case was moot. See also *Coppage v. Kansas*, 236 U.S. 1 (1915); *Hooker v. Burr*, 194 U.S. 415 (1904); and *Singer Mfg. Co. v. Wright*, 141 U.S. 696 (1891).

It is therefore submitted that the present case is controlled by *Doremus* and *Alejandrino*, *supra*, and that the petition for writ of certiorari herein should be denied because the case is moot.

II. The Appellants Have Not Fairly Stated the Facts of the Case.

The appellants present the following question:

> "When a Chancellor finds as a fact that a municipal contract is null and void because the Administrator grossly abused his discretion in preferring one contractor over another, can the Supreme Court of Pennsylvania refuse to review the record to see if there was substantial evidence to support the aforesaid finding solely because it finds that the Chancellor was biased towards the municipality and further in such circumstances, can the Decree of the Chancellor be set aside without the grant of a new trial before a new Chancellor?"

Appellants' assertion that the Supreme Court of Pennsylvania refused to review the record to see if there was substantial evidence to support the Chancellor's finding is completely unwarranted.[1] In the first place, the Chancellor's

[1] In their Statement in their Petition for Writ of Certiorari the appellants make the following statement which is totally and completely unwarranted.

> "The Opinion of the Supreme Court of Pennsylvania states that the Court will not consider the finding that the contract was improperly negotiated and constituted a gross abuse of administrative discretion solely because the Supreme Court of Pennsylvania found that the Chancellor, Joseph E. Gold, was pre-

finding that the Streets Commissioner abused his discretion was inextricably tied to its legal conclusion that the Commissioner should have awarded the contract only upon competitive bidding. The Supreme Court of Pennsylvania reversed the Chancellor on the law and held that the Streets Commissioner could properly award a contract by negotiation and that the Streets Commissioner had acted with full propriety. The Supreme Court then specifically found that the Chancellor had erred in his finding of bias on the part of the Streets Commissioner stating (43a):

> "The lower court also erred in ruling that the commissioner of the streets department abused his discretion in negotiating the contract with Corporation."

When the Court made this statement, it was fully aware of the conclusions which the Chancellor reached at and specifically repudiated them on the ground that they were based not on the facts of the case, but upon the Chancellor's "obvious and extreme bias". The Court continued (43a):

> "The court felt that there was adequate testimony to the effect that the costs involved were exorbitant in comparison to those at other landfill sites, and that the transaction reeked of personal and political favoritism.
>
> "Unfortunately, the chancellor in this case, both by his conduct in the course of the trial and by his adjudication, demonstrated obvious and extreme bias. The chancellor became so personally involved in this litigation that his examination and cross-examination of witnesses extended to over 2,000 questions, considerably more than the number of questions asked by counsel for the plaintiff-taxpayers. The admonition which Justice (now Chief Justice) Bell quoted in *Common-*

---

judiced toward the City of Philadelphia in his conduct of the trial."

Nowhere in the Opinion of the Supreme Court of Pennsylvania is there any statement that it was not considering any aspect of the case.

> *wealth v. Horn*, 395 Pa. 585, 591, 150 A. 2d 872 (1959), 'It is always the right and sometimes the duty of a trial judge to interrogate witnesses, although, of course, questioning from the bench should not show bias or feeling nor be unduly protracted,' is most applicable here. Thus, in addition to the two reversible errors discussed above, the extensive examination of witnesses, the unduly protracted questioning from the bench and the apparent display of bias and partisanship by the Chancellor vitiates the reliability of his findings and requires us to reverse his decree."

When the Supreme Court of Pennsylvania rendered its decision, it had before it the complete record of the trial below consisting of over 900 pages. Only by examination of the record could it have determined that the Chancellor's findings were unwarranted and that the Commissioner of Streets had not abused his discretion. Contrary to appellants' contentions, the Court clearly reviewed the record and found that the evidence warranted its reversal of the Chancellor. Moreover, oral argument was presented to the Court by both the appellants and the City, at which time the case was fully developed and all the various arguments on both sides made to the Court.

The appellants now claim that they should have received a new trial before an unbiased Chancellor. Such a claim might be understandable had the Chancellor been biased against them, but where the Chancellor was biased in their favor and allowed them extreme latitude in presenting their case and even aided them in its presentation, such a claim is unsupportable to the point of absurdity. The Supreme Court not only reviewed all the evidence but reviewed a record in which every advantage had been given the appellants; it nevertheless resolved all the legal factual questions against the appellants. In a new trial the appellants could present nothing new and actually would not be permitted to offer all the evidence they were able to present before the Chancellor. It is therefore submitted that appel-

lants' contention that the case was not properly reviewed by the Supreme Court of Pennsylvania is frivolous and completely without merit.

III. EVEN IF ARGUENDO THE QUESTION PRESENTED TO THIS COURT BY THE APPELLANTS IS TAKEN AS A FAIR STATEMENT OF THE CASE, IT OFFERS NO BASIS FOR THE GRANTING OF A WRIT OF CERTIORARI BY THIS COURT.

(a) *Appellants Never Raised Any Federal Question in the State Courts.*

The appellants did not raise any federal question in either their original Complaint in Equity or in their petition for reargument before the State Supreme Court.[2] Their whole case prior to the filing of the Petition for Writ of Certiorari before this Court was based on the claim that the City had improperly interpreted the Philadelphia Home Rule Charter, that the City Council had not approved the contract and that the Streets Commissioner had shown bias. All of these issues were resolved against them by the State Supreme Court.

It is well settled that an appellant may not for the first time raise a federal question before this Court. Federal questions must be raised below: *Hanson v. Denckla*, 357 U.S. 235 (1958); *Erie Railroad Co. v. Purdy*, 185 U.S. 148 (1902); *Morrison v. Watson*, 154 U.S. 111 (1894); *Baldwin v. Kansas*, 129 U.S. 52 (1888); and *Brooks v. Missouri*, 124 U.S. 394 (1888).

(b) *Appellants Have No Rights Protected by the United States Constitution or Any Federal Law.*

The appellants filed their original action in this case as taxpayers. They alleged no rights under the United States

[2] Certainly the mere use of the words "due process" at one place in the Petition for Reargument without any reference to the United States Constitution whatsoever is insufficient to raise a federal question.

Constitution or any federal law which were violated by the City's award of a contract to Landfill rather than to Clearview. The highest Court of Pennsylvania found that there was no merit to their claim. No federal question was ever argued or considered at any stage of the proceedings. The only legislation in issue was the Philadelphia Home Rule Charter. It was long ago settled that construction of state or municipal law in itself raises no federal question. *Morley v. Lake Shore and M.S.R. Co.*, 146 U.S. 162 (1892); *Henderson Bridge Co. v. Henderson*, 141 U.S. 679 (1891). Although the action herein was filed as a taxpayers' suit, the plaintiffs are all employees of Clearview or their spouses and the principal thrust of their pleading and evidence was that Clearview should have received the contract involved instead of Landfill. It is clear, however, that even if the matter is viewed in terms of the rights of Clearview, there is no federal question involved. The Chancellor in the trial court in compliance with appellants' prayer enjoined the City from complying with a negotiated contract to dump refuse at Landfill. It did not establish any right in Clearview whatever. Had the Chancellor's ruling been upheld, the City would have been obliged to select a dump site on the basis of competitive bidding. There is no assurance that Clearview would have been the successful bidder and, indeed, it is unlikely that it could have been. The record amply demonstrated that the City was not interested in using any dump site adjacent to the City which violated state health standards and which had proved to be a nuisance to adjacent residents of Philadelphia as the Clearview dump had done. It is only fair to assume under the circumstances that bid specifications would eliminate any dump site as close to the City as Clearview and with Clearview's record of legal violations. Thus there has never been alleged any right in Clearview protected by the United States Constitution or any federal laws.

CONCLUSION

The appellees submit that the appellants' petition for a writ of certiorari in this Court is frivolous and completely without merit. No federal question was raised at any point in the proceedings before the state courts, because indeed there was no federal question involved. The basic questions in this case involved interpretation of the Philadelphia Home Rule Charter, a purely local matter. The appellants had their full day in court before the Chancellor, who granted them unwarranted leeway in pressing their case. The Supreme Court of Pennsylvania reviewed the very ample record and decided not only the legal issues but the factual issues against the appellants. Their present complaint that their federal rights have been violated because the matter was not remanded to another chancellor for a lengthy, expensive and vain rehearing, it is submitted is wholly unwarranted.

For the reasons stated, the appellees pray that Your Honorable Court deny a writ of certiorari in this case.

Respectfully submitted,

MATTHEW W. BULLOCK, JR.
Assistant City Solicitor
JAMES L. STERN
Deputy City Solicitor
DAVID BERGER
City Solicitor
Attorneys for Appellees